2013 DRAFTING REQUEST

Bill

Received:	**2/15/2013**	Received By:	**phurley**
Wanted:	**As time permits**	Same as LRB:	
For:	**Jim Steineke (608) 266-2418**	By/Representing:	
May Contact:		Drafter:	**phurley**
Subject:	**Courts - evidence**	Addl. Drafters:	
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Rep.Steineke@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Hearsay exception if witness unavailable due to actions of defendant

Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P1	phurley 3/11/2013	evinz 3/5/2013	phenry 3/6/2013	_____ _____	sbasford 3/6/2013		
/1		evinz 3/12/2013	jmurphy 3/12/2013	_____ _____	srose 3/12/2013	sbasford 4/8/2013	

FE Sent For:

Not needed

<END>

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P1	phurley 2/18/2013	evinz 3/5/2013	phenry 3/6/2013	_____ _____	sbasford 3/6/2013		

FE Sent For: 1 eev 3/12/13 Jm 3/12 sdf

<END>

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Subject:	**Courts - evidence**	Addl. Drafters:	
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Rep.Steineke@legis.wisconsin.gov**
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

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Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P1	phurley	lpl eev 3/5/13	3/5 ph				

FE Sent For:

<END>

Hurley, Peggy

From: Hurley, Peggy
Sent: Friday, February 15, 2013 11:30 AM
To: Rep.Steineke
Subject: RE: Proposed Legislation to Amended Section 908.045 of Wisconsin Statute

Hi Jon,

I read the *Jensen* decision and it certainly discusses interesting questions! I will draft a bill to create this exception to the hearsay exclusion. I do have a question about the standard of proof for this exception, however.

The *Jensen* decision explicitly adopts the "preponderance of evidence" standard (and explicitly rejects the higher "clear and convincing evidence" standard) to determine whether the defendant caused the witness' absence.
The "preponderance of evidence" standard appears to be the norm for questions of evidence in Wisconsin; do you think it is necessary or wise to explicitly state that that standard applies in these questions? The argument for including the standard of proof is that some jurisdictions do use the higher standard, esp. when the very question of whether the defendant caused the death (and therefore, the unavailability) of the witness is the point of the trial.

The arguments for not including the standard of proof are that the Supreme Court has already explicitly adopted the lower standard in *Jensen*, and the possibility that by explicitly stating that the standard of proof for these questions is the "preponderance of evidence," the statutory language may be interpreted to imply that the standard of proof for other hearsay exceptions must be something different. I lean toward not including the standard of proof in the statutes, for these reasons, but I thought I'd raise the issue before I wrote the draft. Please let me know your thoughts.

Peggy Hurley
Legislative Reference Bureau
266 8906

From: Rep.Steineke
Sent: Friday, February 15, 2013 9:34 AM
To: Hurley, Peggy
Subject: FW: Proposed Legislation to Amended Section 908.045 of Wisconsin Statute

Hi Peggy-

I'm wondering if we can get something drafted to address the concerns in the attached letter.

Thanks!

Jon Turke
Office of Rep. Jim Steineke
Assistant Majority Leader
608-266-2418

From: Vince Biskupic [mailto:vince@biskupiclegalgroup.com]
Sent: Thursday, February 14, 2013 5:35 PM
To: Rep.Steineke
Subject: Proposed Legislation to Amended Section 908.045 of Wisconsin Statute

Rep. Steineke—

See attached letter on an important law enforcement and victims issues.

Thanks for your review.

Atty. Vince Biskupic

BISKUPIC
LEGAL GROUP

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Suite 215
Appleton, WI 54911

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+1 920 734-1020
www.biskupiclegalgroup.com

February 14, 2013

SENT VIA E-MAIL
Representative Jim Steineke
State Capitol, 304 North
Madison, WI 53708

Re: Giving Homicide Victims A Voice In Court
Proposed Amendment to Wisconsin Statute Section 908.045

Dear Representatives Steineke:

I am aware of your past support for pro-law enforcement legislation. I write to urge you to promptly propose/draft and support an amendment to Wisconsin Statute Section 908.045 to help give a voice in the courtroom to homicide victims and to those threatened or intimidated by perpetrators.

At the present time, federal rules of evidence allow statements from homicide victims and others declared unavailable when a criminal defendant has caused the witness to be unavailable. In some state court jurisdictions, such statements would be precluded from court as hearsay. Federal Rule of Evidence 804 gives some exceptions to the hearsay rule, including Rule 804(6) which states as follows:

(6) ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Wisconsin has a comparable statute (Section 908.045) that lists some exceptions to the hearsay rule, but it does not include one comparable to the federal rule in 804(6) listed above. The issue was addressed somewhat in the Wisconsin Supreme Court case of *State v. Jensen,* 299 Wis.2d 267 (2007). However, the Wisconsin legislature has not specifically added such an exception to the hearsay rule under Section 908.045. Without this amendment, there is a risk that future appellate courts in Wisconsin could make rulings contrary to *Jensen.*

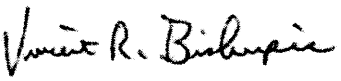
By way of example, this amended statute could have played some relevance if a violent perpetrator such Radcliffe Haughton had escaped or survived the October 2012 Azana Spa shooting in Brookfield, Wisconsin. In that event, Radcliffe killed his wife Zina and two others. If Radcliffe had survived and was prosecuted, law enforcement would desire to get in past statements from Zina to others about Radcliffe's history of threats and abuse. If Wisconsin had a hearsay exception rule similar to Federal Rule of Evidence 804(6), this would give the murdered

victim a guaranteed voice at a jury trial. Without such specific rule, there would remain a risk that the trial judge would not let such evidence in at a jury trial. There would be a risk that the criminal defendant would gain an advantage by eliminating a key trial witness and making her unavailable for trial.

For the sake of victims and law enforcement, I urge you to take prompt action on this important matter. If you have questions, please feel free to contact me.

Respectfully yours,

BISKUPIC LEGAL GROUP LLC



Vincent R. Biskupic
vince@biskupiclegalgroup.com

VB:bg

SUPREME COURT OF WISCONSIN

CASE NO.:	2004AP2481-CR

COMPLETE TITLE:

State of Wisconsin,
Plaintiff-Appellant-Cross-Respondent,
v.
Mark D. Jensen,
Defendant-Respondent-Cross-Appellant.

ON BYPASS FROM THE COURT OF APPEALS

OPINION FILED:	February 23, 2007
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	January 11, 2006

SOURCE OF APPEAL:

COURT:	Circuit
COUNTY:	Kenosha
JUDGE:	Bruce E. Schroeder

JUSTICES:

CONCURRED:	
CONCUR/DISSENT:	BUTLER, JR., J., concurs in part, dissents in part (opinion filed).
DISSENTED:	
NOT PARTICIPATING:	

ATTORNEYS:

For the plaintiff-appellant-cross-respondent the cause was argued by *Marguerite M. Moeller*, assistant attorney general, with whom on the briefs was *Peggy A. Lautenschlager*, attorney general.

For the defendant-respondent-cross-appellant there were briefs by *Craig W. Albee* and *Glynn, Fitzgerald, Albee & Strang, S.C.*, Milwaukee, and oral argument by *Craig W. Albee*.

2007 WI 26

No. 2004AP2481-CR
(L.C. No. 2002CF314)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Appellant-Cross-Respondent,

v.

Mark D. Jensen,

Defendant-Respondent-Cross-Appellant.

FILED

FEB 23, 2007

A. John Voelker
Acting Clerk of Supreme Court

APPEAL from an order of the Circuit Court for Kenosha County Circuit Court, Bruce E. Schroeder, Judge. *Affirmed in part; reversed in part; and cause remanded.*

¶1 JON P. WILCOX, J. This case comes before us on a petition to bypass the court of appeals pursuant to Wis. Stat. § (Rule) 809.60 (2005-06). The State of Wisconsin appealed an order of the Kenosha County Circuit Court, Bruce E. Schroeder, Judge, denying the admissibility of Julie Jensen's (Julie) letter to the police and her voicemail message and other oral statements to Officer Ron Kosman (Kosman). The defendant, Mark D. Jensen (Jensen), cross-appealed the same order of the

circuit court denying his motion to exclude statements Julie made to her neighbor, Tadeusz Wojt (Wojt), and her son's teacher, Theresa DeFazio (DeFazio).

¶2 We affirm the order of the circuit court as to its initial rulings on the admissibility of the various statements under Crawford v. Washington, 541 U.S. 36 (2004). That is, the statements Julie made to Kosman, including the letter, are "testimonial," while the statements Julie made to Wojt and DeFazio are "nontestimonial." However, we reverse the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine. Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused. As such, the case must be remanded to the circuit court for a determination of whether, by a preponderance of the evidence, Jensen caused Julie's unavailability, thereby forfeiting his right to confrontation.

I

¶3 A criminal complaint charging Jensen with first-degree intentional homicide in the December 3, 1998, poisoning death of his wife was filed in Kenosha County on March 19, 2002.

¶4 At Jensen's preliminary hearing conducted on April 23, 2002, and May 8, 2002, before the Honorable Carl M. Greco, Court Commissioner, the State presented testimony from several witnesses including Wojt, Kosman, and Detective Paul Ratzburg (Ratzburg).

¶5 Wojt testified that just prior to Julie's death, she gave him an envelope and told him that if anything happened to her, Wojt should give the envelope to the police. Wojt also stated that during the three weeks prior to Julie's death, she was upset and scared, and she feared that Jensen was trying to poison her or inject her with something because Jensen was trying to get her to drink wine and she found syringes in a drawer. Julie also allegedly told him that she did not think she would make it through one particular weekend because she had found suspicious notes written by her husband and computer pages about poisoning.

¶6 Kosman testified that he received two voicemails approximately two weeks prior to Julie's death. Julie told Kosman in the second voicemail that she thought Jensen was trying to kill her, and she asked him to call her back. Kosman returned Julie's call and subsequently went to her home to talk with her. Julie told Kosman that she saw strange writings on Jensen's day planner, and she said Jensen was looking at strange material on the Internet.[1] Julie also informed Kosman that she had photographed part of his day planner and gave the pictures, along with a letter, to a neighbor (Wojt). Julie then retrieved the picture, but not the letter from the neighbor, and gave it to Kosman telling him if she were found dead, that she did not

[1] After Julie's death, police seized the computer in the Jensen's home and found that on various dates between October 15 and December 2, 2002, several websites related to poisoning were visited; including one entitled "Ethylene Glycol."

commit suicide, and Jensen was her first suspect. Kosman also testified that in August or September of 1998, Julie told him it had become very "cold" in the residence and that Jensen was not as affectionate as he used to be. She claimed that when Jensen came home from work, he would immediately go to the computer.

¶7 Finally, Ratzburg testified at the preliminary hearing that on the day after Julie's death, he received a sealed envelope from Wojt. The envelope contained a handwritten letter,[2] addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg" and bearing Julie's signature that read as follows:

> I took this picture [and] am writing this on Saturday 11-21-98 at 7AM. This "list" was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work [and] the kids; he's an avid surfer of the Internet. . . .
>
> Anyway—I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol [and] multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription for migraine tablets, which Mark use[s] more than I.
>
> I pray I'm wrong [and] nothing happens . . . but I am suspicious of Mark's suspicious behaviors [and] fear

[2] After comparing the letter to known writing samples from Julie, a document examiner with the State Crime Lab concluded that the letter was written by Julie.

> for my early demise. However, I will not leave David [and] Douglas. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), David [and] Douglas.

¶8 Following the preliminary hearing, Jensen was bound over for trial, and an information charging Jensen with first-degree intentional homicide was filed. Jensen subsequently entered a plea of not guilty at his arraignment on June 19, 2002.

¶9 Among the pretrial motions Jensen filed were motions challenging the admissibility of the letter received by Ratzburg and the oral statements Julie allegedly made to Wojt and Kosman. Jensen also challenged the admissibility of oral statements Julie purportedly made to her physician, Dr. Richard Borman (Borman), and her son's teacher, DeFazio.[3] These motions were

---

[3] The criminal complaint provides the following summary of DeFazio's conversations with Julie on November 25, 1998:

> [W]hen I coaxed her, she told me how she was afraid her husband was going to kill her last weekend. When I asked her why she thought such a serious thing was going to happen, she explained why. She had found a paper listing things to buy in her husband's stuff. She said it listed syringes and names of drugs on it. Then she said that she thought he might try to kill her with a drug overdose and make it look like a suicide. I asked her why she thought he would do this. She said that there were other things she couldn't explain. She also wondered aloud if the drugs were for himself, but she didn't ever see him taking drugs so she didn't think that was the reason for the list. . . . One other time she had mentioned that it bothered her how every time she walked into the room when her husband was on the computer, he always turned it off or covered it quickly. She asked him why once, but he said he was doing business stuff, and he was done.

extensively briefed and argued before the court. The circuit court evaluated each of Julie's disputed statements independently to determine its admissibility under the hearsay rules and the then-governing test of Ohio v. Roberts, 448 U.S. 56 (1980). The court ruled that most, but not all, of the statements were admissible. Julie's entire in-person statements to Kosman and the letter sent to Ratzburg were admitted in their entirety. The State conceded the voicemails were inadmissible hearsay.

¶10 On May 24, 2004, Jensen moved for reconsideration on the admissibility of Julie's statements in light of the United States Supreme Court's ruling in Crawford, 541 U.S. 36. After a hearing on the motion, the circuit court orally announced its decision on June 7, 2004, and concluded that Julie's letter and voicemails were testimonial and therefore inadmissible under Crawford. The court rejected the State's argument that the statements were admissible under the doctrine of forfeiture by wrongdoing. The court also determined that Julie's statements to Wojt and DeFazio were nontestimonial, and therefore, the statements were not excluded. On August 4, 2004, the circuit court issued a written order memorializing its oral rulings.

¶11 The State appealed the court's ruling with respect to Julie's letter and her voicemail message to Kosman.[4] Jensen

[4] The district attorney conceded that the statements Julie made to Kosman during a conversation on November 24, 1998, were testimonial. With respect to these statements, the State is arguing only that they are admissible under the forfeiture by wrongdoing doctrine, which is discussed in Section IV.

subsequently cross-appealed the ruling that the statements of Wojt and DeFazio were not excluded. After the State and Jensen had filed opening briefs in the court of appeals, the State filed a petition to bypass, which Jensen did not oppose. We granted the petition.

II

¶12 Reduced to their essence, the appeal and cross-appeal concern the circuit court's determinations on the testimonial or nontestimonial nature of various statements of Julie's that the State seeks to introduce.[5] "Although a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." State v. Williams, 2002 WI 58, 253 Wis. 2d 99, ¶7, 644 N.W.2d 919 (citing State v. Ballos, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999)). For purposes of that review, the appellate court must accept the circuit court's findings of fact unless they are clearly erroneous. State v. Jackson, 216 Wis. 2d 646, 575 N.W.2d 475 (1998).

III

[5] In State v. Manuel, 2005 WI 75, ¶60, 281 Wis. 2d 554, 697 N.W.2d 811, this court held that nontestimonial statements still should be evaluated for Confrontation Clause purposes under the test of Ohio v. Roberts, 448 U.S. 56 (1980). The circuit court's findings under Roberts admitting some statements and excluding others were not reduced to a written order and they are not the subject of either the State's appeal or Jensen's cross-appeal.

¶13 "'The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them.'" State v. Manuel, 2005 WI 75, ¶36, 281 Wis. 2d 554, 697 N.W.2d 811 (quoting State v. Hale, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637); U.S. Const. amend. VI;[6] Wis. Const. art. I, § 7.[7] We generally apply United States Supreme Court precedents when interpreting these clauses. Hale, 277 Wis. 2d 593, ¶43.

¶14 In 2004 the U.S. Supreme Court fundamentally changed the Confrontation Clause analysis in Crawford, 541 U.S 36. Michael Crawford was charged and convicted of assault and attempted murder for stabbing a man, who allegedly tried to rape Crawford's wife, Sylvia. Id. at 38. At trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing. Id. Sylvia did not testify at trial due to Washington's marital privilege; the privilege, however, did not extend to a spouse's out-of-court statements admissible under a hearsay exception. Id. at 40. Crawford contended that this procedure violated his rights under the Confrontation Clause. Id. Relying on Roberts, the trial court concluded that the admission of Sylvia's statement was constitutionally

[6] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"

[7] Article I, Section 7 of the Wisconsin Constitution states that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face."

permissible. Id. Under Roberts, when an out-of-court declarant is unavailable, his or her statement is admissible if it bears an adequate indicia of reliability, which could be satisfied if the statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. Roberts, 448 U.S. at 66. The circuit court admitted the statement on the latter ground, and Crawford was convicted. Crawford, 541 U.S. at 40-41. The Washington Court of Appeals reversed, and the Washington Supreme Court then reinstated the conviction. Id. at 41-42.

¶15 On certiorari, the U.S. Supreme Court determined that Crawford's constitutional right to confrontation was violated, and his conviction was reversed. Id. at 68-69. Justice Scalia, writing for the majority, announced a major shift in Confrontation Clause jurisprudence away from the Roberts reliability standard:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61. The Court determined that the Confrontation Clause bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the

statement. Id. at 68-69. The Roberts test remains when nontestimonial statements are at issue. See Manuel, 281 Wis. 2d 554, ¶¶54-55; Crawford, 541 U.S. at 68.

¶16 The Court, unfortunately, did not spell out a comprehensive definition of what "testimonial" means. What we do know is that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. at 68. The Court also noted that "testimony" is typically a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. at 51 (quoting An American Dictionary of the English Language (1828)). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id.

¶17 The Court mentioned various formulations that had been proposed to define the "core class of 'testimonial' statements" but did not choose among these formulations. Id. at 51-52. In the Court's words, these formulations "all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." Id. at 52:

> [E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
>
> . . . .

> [E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> . . . .
>
> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52.

¶18 This court subsequently adopted all three of the Crawford formulations, and reserved for another day whether these formulations or perhaps a different formulation would become the rule. Manuel, 281 Wis. 2d 554, ¶39. Applying this third formulation in Manuel, we concluded that a witness's statements to his girlfriend, Anna Rhodes (Rhodes), were nontestimonial. Derrick Stamps (Stamps), the witness, told Rhodes that Manuel had shot the victim. Id., ¶9. When Stamps was subsequently taken into custody, Rhodes informed police that Manuel had shot the victim. Id. At trial, the State sought to introduce the statements Stamps made to Rhodes that incriminated Manuel. However, Stamps refused to testify, so the State was forced to admit the statements through the arresting officer. Id., ¶13. Manuel argued this violated his right to confrontation. Id., ¶35. We reasoned that statements "'made to loved ones or acquaintances . . . are not the kind of memorialized, judicial-process-created evidence of which Crawford speaks.'" Id., ¶53 (quoting United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004)). Moreover, we reasoned that Stamps' girlfriend was not a government agent, and there

was no reason to believe that Stamps expected his girlfriend to report to the police what he told her. Id. (citing People v. Cervantes, 12 Cal. Rptr. 3d 774, 783 (Cal. Ct. App. 2004)). Because the conversation was private with no eye towards litigation, we determined the statements were nontestimonial and thus subject to Roberts to determine whether there was a Confrontation Clause violation. Id., ¶¶53, 60.

¶19 In deciding subsequent cases involving the Confrontation Clause, the U.S. Supreme Court retained its position from Crawford that it would not define the term "nontestimonial" beyond the three formulations of the classes of testimonial statements. Davis v. Washington, 126 S. Ct. 2266, 2273 (2006)(also deciding Hammon v. Indiana). The Court did find it necessary to slightly expand its previous discussion of what constitutes testimonial statements to resolve the cases presented, which involved police interrogations. It held as follows: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. at 2273.

¶20 In deciding this case, we are again left with the three formations of testimonial statements from Crawford. Like Manuel, only the third formulation listed above is applicable to the statements at issue in this case, as there was no ex parte in-court statements or extrajudicial statements made in formalized testimonial materials. For the reasons that follow,

we hold that under the third Crawford formulation and the facts and circumstances of this case, the circuit court properly concluded, as a matter of law, that Julie's statements to the police and the letter are testimonial and Julie's statements to her neighbor, Wojt, and her son's teacher, DeFazio, are nontestimonial.

¶21 Generally stated, the State argues that in determining whether a statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" what matters is the expectation of a reasonable person in the declarant's position rather than the subjective purpose of the particular declarant. The State further contends that government involvement in creating a statement is an indispensable feature of a testimonial statement. Alternatively, Jensen's basic thrust is that testimonial statements need not be elicited by the police, and accusatory statements directed to the police are testimonial.

¶22 The parties' opposing positions represent the standard schools of thought of Crawford's intended breadth and scope of testimonial statements. See State v. Davis, 613 S.E.2d 760, 767-68 (S.C. Ct. App. 2005). The narrow definition championed by Professor Akhil Reed Amar suggests that the Confrontation Clause "'encompasses only those "witnesses" who testify either by taking the stand in person or via government-prepared affidavits, deposition, videotapes, and the like.'" Id. at 767 (quoting A. Amar, Confrontation Clause First Principles: A Reply

to Professor Friedman, 86 Geo. L.J. 1045 (1998)). Amar's focus is "what was the common understanding of being a witness against someone during the Founding Era[,]" and he contends that Crawford is implicated only when the circumstances surrounding the statement are formal. Id.

¶23 The broader definition is championed by Professor Richard Friedman. Under this school of thought, "'a declarant should be deemed to be acting as a witness when she makes a statement if she anticipates that the statement will be used in the prosecution or investigation of a crime.'" Id. (quoting Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1040-43 (1998)).

¶24 We note that there is support for the proposition that the hallmark of testimonial statements is whether they are made at the request or suggestion of the police. See State v. Barnes, 854 A.2d 208, 211 (Me. 2004). In our view, however, the Sixth Circuit's decision in United States v. Cromer, 389 F.3d 662 (6th Cir. 2004), aptly describes why such an inquiry is insufficient under Crawford:

> Indeed, the danger to a defendant might well be greater if the statement introduced at trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation. One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation. . . . If the judicial system only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every

> incentive to ensure that testimony is given informally. The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

Id. at 675. Thus, we believe a broad definition of testimonial is required to guarantee that the right to confrontation is preserved. That is, we do not agree with the State's position that the government needs to be involved in the creation of the statement.[8] We believe such a narrow definition of testimonial could create situations where a declarant could nefariously incriminate a defendant.

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[8] We note that recently in State v. Hemphill, 2005 WI App 248, 287 Wis. 2d 600, 707 N.W.2d 313, the court of appeals held that a declarant's spontaneous statement to responding police officers implicating the defendants in a crime was deemed nontestimonial. The court reasoned, in part as follows:

> The statement made by [the declarant] in the instant case does not fall into any of the identified categories of "testimonial" statements. This was not a statement extracted by the police with the intent that it would be used later at trial. It was not an interrogation situation. [The declarant] offered the statement without any solicitation from police. It was a spontaneous statement made to a responding police officer. Like the foreign cases cited by the State in its brief, the [declarant's] statement was offered unsolicited by the victim or witness, and was not generated by the desire of the prosecution or police to seek evidence against a particular subject.

Id., ¶11. We do not read Crawford in such a restrictive light. Under the definition of testimonial adopted today we must overrule Hemphill.

¶25 The State cites to United States v. Summers, 414 F.3d 1287 (10th Cir. 2005), for its contention that the subjective purpose of the declarant is not important to the analysis. However, this is not a correct interpretation of the Summers decision. The Tenth Circuit concluded that "the 'common nucleus' present in the formulations which the Court considered centers on the reasonable expectations of the declarant." Id. at 1302 (emphasis added) (citation omitted). The Tenth Circuit rejected the narrow approach argued in this case by the State, and held that "an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment." Id. (citing Confrontation: The Search for Basic Principles, supra, at 1040-43). In other words, "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Id.[9]

¶26 With these considerations in mind, we turn to the facts and circumstances of this case. We begin first with the statements Julie made in her letter. The circuit court

[9] As noted in Summers, other federal circuits have created similar standards. United States v. Summers, 414 F.3d 1287, 1302 n.9 (10th Cir. 2005) (citing United States v. Cromer, 389 F.3d 662 (6th Cir. 2004); United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005); United States v. Saget, 377 F.3d 223 (2d Cir. 2004)).

concluded that the letter was testimonial as it had no apparent purpose other than to "bear testimony" and Julie intended it exclusively for accusatory and prosecutorial purposes. Furthermore, the circuit court stated, "I can't imagine any other purpose in sending a letter to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter." Indeed, the letter even referred to Jensen as a "suspect."

¶27 In light of the standard set out above, we conclude that under the circumstances, a reasonable person in Julie's position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial. The content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death. Rather than being addressed to a casual acquaintance or friend, the letter was purposely directed toward law enforcement agents. The letter also describes Jensen's alleged activities and conduct in a way that clearly implicates Jensen if "anything happens" to her.

¶28 Furthermore, the State insists that the letter is nontestimonial because it was created before any crime had been committed so there was no expectation that the letter would potentially be available for use at a later trial. However, under the standard we adopt here it does not matter if a crime has already been committed or not. The focus of the inquiry is

whether a "reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Id. We conclude that the letter clearly fits within this rubric.

¶29 Perhaps most tellingly, Julie's letter also resembles Lord Cobham's letter implicating Sir Walter Raleigh of treason as discussed in Crawford, 541 U.S. at 44. At Raleigh's trial, a prior examination and letter of Cobham implicating Raleigh in treason were read to the jury. Id. Raleigh demanded that Cobham be called to appear, but he was refused. Id. The jury ultimately convicted Raleigh and sentenced him to death. Id. In the Supreme Court's view, it was these types of practices that the Confrontation Clause sought to eliminate. Id. at 50. While Julie's letter is not of a formal nature as Cobham's letter was, it still is testimonial in nature as it clearly implicates Jensen in her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe Crawford and the Confrontation Clause do not support such a result.

¶30 For many of the same reasons, we also determine that the voicemails to Kosman are testimonial.[10] The crux of Julie's

[10] Additionally, although the circuit court considered whether the admission of the voicemails violated the Confrontation Clause under Crawford, the court already had excluded the voicemails as inadmissible hearsay. Thus, even if the voicemails are nontestimonial, they must still be excluded under Roberts, 448 U.S. 56.

message was that Jensen had been acting strangely and leaving himself notes Julie had photographed and that she wanted to speak with Kosman in person because she was afraid Jensen was recording her phone conversations. Again, the circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial. See Pitts v. State, 627 S.E.2d 17, 19 (Ga. 2006) ("Where the primary purpose of the telephone call is to establish evidentiary facts, so that an objective person would recognize that the statement would be used in a future prosecution, then that phone call 'bears testimony' against the accused and implicates the concerns of the Confrontation Clause.").

¶31 Finally, we consider the statements Julie made to Wojt and DeFazio. Jensen argues that if the circumstances reveal that the declarant believed her statements to nongovernmental actors would be passed on to law enforcement officials, those statements are testimonial. While we reiterate that governmental involvement is not a necessary condition for testimonial statements, we conclude that under the circumstances of this case, Julie's statements to Wojt and DeFazio were nontestimonial. Essentially, we are not convinced that statements to a neighbor and a child's teacher, unlike the